

III. Narrow Tailoring

A. Race-Neutral Alternatives

Did Congress or the agency consider race-neutral means to achieve the ends of the program at the time it was adopted? Race-neutral alternatives might include preferences based on wealth, income, education, family, geography. In the commercial setting, another such alternative is a preference for new, emerging businesses. Were any of these alternatives actually tried and exhausted? What was the nature and extent of the deliberation over any race-neutral alternatives – for example, congressional debate? agency rulemaking? Was there a judgment that race-neutral alternatives would not be as efficacious as race-conscious measures? Did Congress or the agency rely on previous consideration and rejection of race-neutral alternatives in connection with a prior, related race-conscious measure (or series of measures)?

B. Continued Need

How long has the program been in existence? Even if there was a compelling justification at the time of adoption, that may not be the case today. Thus, an agency must determine whether there is a continued need for the program. In that regard, does the program have an end date? Has the end date been moved back? Is the program subject to periodic oversight? What is the nature of that oversight – does Congress play a role through hearings/reports, or does the agency conduct the review or oversight on its own? Has the program ever been adjusted or modified in light of a periodic review? What were the results of the most recent review and oversight conducted by either Congress or the agency? Is there evidence of what might result if the racial classification were discontinued? For example, is there evidence of the current level of minority participation in government contracting where racial criteria are not used (which may speak to whether discrimination can be remedied without a preference)?

C. Pool of Beneficiaries

Are the benefits of the program spread relatively equally among minority individuals or businesses? Is there information on whether the same individuals or businesses tend to reap most of the benefits, and if so, whether those beneficiaries have overcome discrimination? If the program is intended to remedy discrimination against minorities, does it include among its beneficiaries subgroups that may not have been discriminated against? Is there a procedure for tailoring the pool of beneficiaries to exclude such subgroups? Is there a mechanism for evaluating whether the program is needed for segments within a larger industry that have been the locus of discrimination?

D. Manner in Which Race is Used

Does the program establish fixed numerical set-asides? Is race an explicit requirement of eligibility for the program? If there is no such facial requirement, does the program operate that way in practice? Or is race just one of several factors -- a "plus" -- used in decisionmaking? Could the objectives of a program that uses race as a requirement for eligibility be achieved through a more flexible use of race?

E. Burden

What is the nature of the burden imposed on persons who are not included in the racial or ethnic classification that the program establishes? Does the program displace those persons from existing positions/contracts? Does it upset any settled expectations that they have? Even if that is not the case, the burden may be impermissible where the exclusionary impact is too great. What is the exclusionary impact in terms of size and dimension? What is the dollar value of the contracts/grants/positions in question? Does the exclusionary impact of the program fall upon a particular group or class of individuals or sectors, or is it more diffuse? What is the extent of other opportunities outside the program? Are persons who are not eligible for the preference put at a significant competitive disadvantage as a result of the program?

EXHIBIT I

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

July 19, 1995

July 19, 1995

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Evaluation of Affirmative Action Programs

This Administration is committed to expanding the economy, to strengthening programs that support children and families, and to vigorous, effective enforcement of laws prohibiting discrimination. These commitments reflect bedrock values -- equality, opportunity, and fair play -- which extend to all Americans, regardless of race, ethnicity, or gender.

While our Nation has made enormous strides toward eliminating inequality and barriers to opportunity, the job is not complete. As the United States Supreme Court recognized only one month ago in *Adarand Constructors, Inc. v. Peña*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." This Administration will continue to support affirmative measures that promote opportunities in employment, education, and government contracting for Americans subject to discrimination or its continuing effects. In every instance, we will seek reasonable ways to achieve the objectives of inclusion and antidiscrimination without specific reliance on group membership. But where our legitimate objectives cannot be achieved through such means, the Federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair.

Accordingly, in all programs you administer that use race, ethnicity, or gender as a consideration to expand opportunity or provide benefits to members of groups that have suffered discrimination, I ask you to take steps to ensure adherence to the following policy principles. The policy principles are that any program must be eliminated or reformed if it:

- (a) creates a quota;
- (b) creates preferences for unqualified individuals;

(c) creates reverse discrimination; or

(d) continues even after its equal opportunity purposes have been achieved.

In addition, the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña* requires strict scrutiny of the justifications for, and provisions of, a broad range of existing race-based affirmative action programs. You recently received a detailed legal analysis of *Adarand* from the Department of Justice. Consistent with that guidance, I am today instructing each of you to undertake, in consultation with and pursuant to the overall direction of the Attorney General, an evaluation of programs you administer that use race or ethnicity in decision making. With regard to programs that affect more than one agency, the Attorney General shall determine, after consultations, which agency shall take the lead in performing this analysis.

Using all of the tools at your disposal, you should develop any information that is necessary to evaluate whether your programs are narrowly tailored to serve a compelling interest, as required under *Adarand*'s strict scrutiny standard. Any program that does not meet the constitutional standard must be reformed or eliminated.

WILLIAM J. CLINTON

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CERTIFICATE OF SERVICE

I, Ana Julissa Ayala, do hereby certify that I have this 21st day of August, 1995, mailed by first-class United States mail, postage prepaid, copies of the foregoing **“Petition for Reconsideration”** to the following:

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